Filed 11/16/09 Anderson v. Berz CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JAMES ANDERSON, Plaintiff and Appellant, v. DONALD BERZ et al., Defendants and Respondents.	E046227 (Super.Ct.No. RCVRS087894) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Keith D. Davis, Judge. Reversed in part and affirmed in part with directions.

Law Offices of Gloria Dredd Haney and Gloria Dredd Haney for Plaintiff and Appellant.

Liebert Cassidy Whitmore, Peter J. Brown and Donna R. Evans for Defendants and Respondents.

Plaintiff and appellant James Anderson (Anderson) sued defendants and respondents Chaffey Community College District (Chaffey) and certain officers and

employees of Chaffey (collectively, defendants) alleging causes of action based upon employment discrimination and retaliation. Defendants moved for summary judgment. Anderson filed an unfinished memorandum of points and authorities and an incomplete separate statement, then applied to the trial court ex parte for additional time to obtain and file additional declarations and a complete memorandum of points and authorities. After the trial court denied the request, Anderson petitioned this court for a writ of mandate to compel the trial court to grant an extension of time to allow Anderson to "complete [his] opposition to the defendants' motion for summary judgment." We issued a peremptory writ directing the trial court to permit Anderson to file the additional declarations and "to reference the additional declarations in [his] opposing papers." In response to the writ, the trial court allowed Anderson to file additional declarations, but denied his request to file additional opposition papers. Thereafter, Anderson filed nine new declarations. Following a hearing, the court granted the defendants' motion for summary judgment. After the entry of judgment in defendants' favor, Anderson appealed.

Anderson contends the trial court's refusal to permit him to file additional opposition papers was contrary to our writ and deprived him of due process and a fair hearing. He further argues that the court erroneously granted summary judgment on the merits of his claims. We agree that the court erred when it precluded him from filing additional opposition papers. Because we cannot say that this error was harmless as to the claims against Chaffey, we will reverse the judgment in favor of Chaffey. However,

because the California Supreme Court has recently held that nonemployer individuals may not be sued for retaliation under the Fair Employment and Housing Act (FEHA)—the only remaining cause of action Anderson asserts against the individual defendants—judgment in their favor is proper regardless of the procedural error.

I. SUMMARY OF FACTS AND PROCEDURAL HISTORY

Anderson was hired by Chaffey in 1987 as a vice-president of planning and development. In 1993, he became a tenured teacher in the broadcasting program of what later became known as the School of Visual and Performing Arts. He thereafter taught at all relevant times in that program.

In April 2004, Anderson filed a complaint with the California Department of Fair Employment and Housing (DFEH), in which he alleged that defendants engaged in "a long-standing, and diverse pattern of specific discrimination against" him since 1992, that he has "continuously complained about the disparate treatment, harassment, and retaliation against [him]," and that "[n]othing has been done other than to make [his] working conditions worse." He describes particular instances of discrimination, harassment, and retaliation. These include: making harassing demands to respond to and sign forms about absences from class while he was on a leave of absence protected by the Family Medical Leave Act and the California Family Rights Act; failing to properly equip and prepare his classroom; disrupting his class and denying him the assistance of an instructional assistant when an assistant was provided to younger instructors (Anderson is 60 years old); referring to him as a "dinosaur," and preventing him from

teaching in the laboratory with new equipment because, he was told, he is too old and out of touch; humiliating and isolating him by making him the subject of a "scathing letter" sent to faculty and staff; and retaliating against him for protesting against Chaffey's alleged discrimination against an older woman applicant. The DFEH issued a right to sue letter on May 27, 2004.

On March 8, 2004, Anderson and his wife, Gloria Anderson (Gloria), presented a claim to Chaffey against Chaffey pursuant to the Tort Claims Act (Gov. Code, § 900 et seq.). This claim is based on the same essential facts, with some additional details, as Anderson's DFEH complaint. Gloria asserted damages for loss of consortium. Chaffey rejected the claim in a letter dated April 23, 2004.

Anderson and Gloria commenced this action by filing a complaint on October 22, 2004. The operative pleading, a second amended complaint, was filed in July 2006. The second amended complaint alleges the same essential facts alleged in the DFEH complaint and the government tort claim. As is relevant here, the Andersons asserted causes of action for age discrimination, disability discrimination, retaliation, and violation of Labor Code section 1102.5.[1] Each cause of action is asserted against

[1] The Andersons also asserted claims for violation of the California Family Rights Act, harassment under the Fair Employment and Housing Act, defamation, and negligence. Gloria alleged a separate cause of action for "Loss of Consortium Damages." According to Chaffey, the California Family Rights Act and harassment claims were dismissed when a demurrer was sustained as to these causes of action and Anderson failed to amend. Anderson has expressly abandoned the defamation and negligence claims in his opening brief in this appeal.

Chaffey; in addition, the Andersons name five individuals as defendants in the retaliation cause of action.

In November 2006, defendants filed a motion for summary judgment or summary adjudication as to Gloria's causes of action. In January 2007, the court granted summary adjudication as to Gloria's loss of consortium claims as to some of the causes of action and denied the motion as to others. Gloria is not a party to this appeal.

In January 2007, defendants filed a motion for summary judgment or, in the alternative, for summary adjudication of Anderson's causes of action. The motion was supported by a 48-page memorandum of points and authorities, a separate statement identifying 184 purportedly undisputed material facts, 16 declarations, and numerous deposition excerpts and other evidentiary items.

In opposition to the motion, Anderson submitted a separate statement in response to Chaffey's separate statement of undisputed facts, a five-page memorandum of points and authorities, and numerous deposition excerpts, declarations, and other evidentiary items. The memorandum of points and authorities consists of a discussion of summary judgment standards and an argument that Gloria has complied with the government tort claims statute. The opposition separate statement includes extensive portions in which facts proffered by defendants are ostensibly disputed by Anderson, but without citation to evidence supporting a dispute.

Attached to the opposition memorandum of points and authorities is a declaration by Anderson's counsel made pursuant to Code of Civil Procedure section 437c,

subdivision (h). This subdivision permits a court to deny a motion for summary judgment or order a continuance to allow time for affidavits to be obtained or for additional discovery to be had. In her declaration, counsel explained that she was recently injured and that she could not prepare a memorandum of points and authorities because of the medication she was taking and was not able to complete Anderson's responses to defendants' separate statement. She further stated that she has not received documents from defendants that defendants were ordered to produce, and that her injuries and medication have prevented her from filing "extremely important declarations."

One week after his opposition papers were filed, Anderson applied ex parte for an extension of time to oppose the motion for summary judgment. The application was based upon defendants' alleged failure to produce documents, Anderson's counsel's injury and medication, and the ongoing preparation of declarations to support the opposition. Anderson also sought permission to file "a memorandum of points and authorities up to 45 pages, if necessary." The trial court denied the ex parte application.

On April 19, 2007, Anderson petitioned this court for a writ of mandate directing the trial court to grant Anderson's request for an extension of time and a 10-day continuance to complete the opposition to defendants' motion.[2] The next day, we ordered the proceedings on defendants' motion for summary judgment stayed and requested that defendants file a response to the petition. In a subsequent order issued on

[2] We take judicial notice of the papers filed in the writ proceedings. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

July 10, 2007, we noted that the issuance of the stay effectively rendered the request for a continuance moot. We further stated: "We tend to agree with petitioners that the trial court abused its discretion in refusing a brief continuance so that they could produce additional evidence in responding to the motion for summary judgment. However, when this court issued a stay, the matter essentially became moot. Accordingly, we will limit ourselves to directing the trial court to permit the new declarations to be filed prior to the new date for the hearing. [¶] Let a peremptory writ of mandate issue, directing the Superior Court of San Bernardino County to set a new date for hearing on real parties' motion for summary judgment, and to permit petitioners to submit the additional declarations referenced in their motion for a continuance. The stay previously ordered is DISSOLVED." We directed Anderson "to prepare and have the peremptory writ of mandated issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties."

Counsel for Anderson prepared and submitted a proposed peremptory writ, directed to the Superior Court of San Bernardino County, commanding the court: "[T]o set a new date for hearing on [defendants'] motion for summary judgment. [The court is] further commanded to permit petitioners to submit the additional declarations referred to in their motion for continuance before the new hearing date and permit the petitioners to reference the additional declarations in their opposing papers as requested in their petition. The stay previously ordered by this Court is DISSOLVED. [¶] By order of the

court." We thereafter issued the writ as proposed. The remittitur was filed the same day. Counsel for Anderson caused the writ to be served on the superior court.

Defendants did not take any action to recall or otherwise challenge the writ as issued.

In October 2007, a hearing was held in the trial court to determine what documents Anderson may file in further support of the opposition to the motion for summary judgment. Defendants argued that Anderson should not be permitted to file additional opposing papers beyond the new declarations. The trial court agreed. Relying primarily upon our July 10, 2007, order granting Anderson's writ petition, the court explained: "The order . . . says: 'Accordingly, we will limit ourselves to directing the trial court to permit the new declarations to be filed prior to the new date for the hearing.' [¶] But I don't see anything in the order that indicates that there are going to be any new Points and Authorities or any other documents that are going to be allowed to be filed or ordered to be filed pursuant to the Court's directive allowing the additional declarations to be filed. [¶] So it seems to me that really what is permitted and directed pursuant to the order from the Fourth District is to allow [Anderson's counsel] those additional declarations that you are able to prepare to have those served and filed absent any additional Points and Authorities in opposition to the motion for summary judgment. . . . [¶] So that whatever additional declarations you have that you wish to file in opposition to the motion for summary judgment, I'm prepared to allow you to. I'm not prepared at this point, however, to allow anybody to do any filing of any additional points and

authorities or any other paperwork either in support of or opposition to the summary judgment motion."

Anderson's counsel then inquired: "I have these additional declarations. How is the court going to know how I'm using them, you know, in support of the opposition? In other words, how is the Court going to know where to apply the declarations in plaintiff's opposition to the motion for summary judgment? What specifically will the declaration[s] go to in order to oppose the motion? Because the testimony in the declarations are intended to oppose specific issues that are being raised in the opposition. [¶] So just to have the declaration[s] there without knowing exactly where to actually apply the declarations I don't understand how that's going to work."

The court responded: "Well, I'm not certain at this point that I necessarily understand that either. I suppose I'll have to wait and see what the declarations actually say. [¶] But again, there's nothing in the language of the Court of Appeal in the issuance of the writ that indicates that any further pleadings or materials are allowed to be filed by either side over and above the declarations. [¶] So while I can understand the concerns that you have and certainly they'll be of some interest to me because I have to read these declarations. I suppose I'll simply have to try and get through them as best I can and determine as to which issues the various declarations are directed. [¶] Okay. That's not much of an answer, but it's the best one I can come up with."

After some further discussion, the court stated that defendants would be permitted to file a response to Anderson's new declarations, and concluded by telling Anderson's

counsel: "I think [Anderson is] simply going to have to file those declarations and we'll do with them what we can. And the Court will have your declarations and [the defendants'] further reply to your opposition to try and help guide the Court through various issues."

Anderson thereafter filed declarations by nine individuals. Defendants filed written objections to the declarations and a "response to supplemental declarations filed by plaintiffs in opposition to defendants' motion for summary judgment." (Capitalization omitted.) Plaintiff moved to strike this response, which the court denied.

At the hearing on the motion, the court announced its tentative ruling to grant the motion for summary judgment and explained its reasons for doing so. Anderson's counsel asserted that the court did not understand what evidence applied to which cause of action. She stated: "[W]hen the appellate court issued the writ . . . , I asked you specifically if I could, in addition to the declarations, . . . complete the documents because I believed that's what they were saying. That's what I think all of this confusion is. Because all you had were the declarations, the subsequent declarations, and not how they applied or how the additional facts that were being brought out applied." In concluding her argument, counsel noted: "I just think, in all fairness to my client, I mean there is [*sic*] so many facts here and so much has not been put into the context that it should have been . . . ."

Following argument, the court overruled all of the parties' objections to evidence and granted the motion. The court stated that it considered "each and every one" of the declarations and deposition transcripts in its review of the motion.

II. ANALYSIS

A. *Failure to Comply With the Peremptory Writ*

Anderson contends the trial court's refusal to permit him to file additional opposition papers in connection with his new declarations was error. We agree.

As set forth above, the trial court focused entirely upon our July 10, 2007, order. By doing so, the court appears to have ignored or disregarded the language of the peremptory writ itself. In the writ, we directed the court to permit Anderson not only to file additional declarations, but "to reference the additional declarations in [his] opposing papers . . . ." Although the writ does not specifically refer to a memorandum of points and authorities or an opposition separate statement, in the context of a motion for summary judgment the phrase "opposing papers" must reasonably be construed as including such papers. (See Code Civ. Proc., § 437c, subd. (b)(3); Cal. Rules of Court, rule 3.1350(e).) By refusing to permit Anderson to file a memorandum of points and authorities or separate statement (i.e., opposing papers) that refer to the new declarations, the court disobeyed the writ.

Defendants point out (as they did below) that the peremptory writ was prepared by Anderson's counsel. By including language regarding opposing papers, defendants assert Anderson "expanded, extended and created an order not made by this Court." The trial

court, they add, "was not influenced by the language [Anderson] inserted into the Peremptory Writ, and instead followed the actual order made by this Court." Defendants' argument suggests that the peremptory writ is not an "actual order" from this court. We strongly reject this suggestion. A writ is "an order or precept in writing, issued in the name of the people, or of a court or judicial officer . . . ." (Code Civ. Proc., § 17, subd. (b)(6).) When we issue a peremptory writ, we are "command[ing] the party to whom it is directed" (here, the trial court) "to do the act required to be performed." (*Id.*, § 1087.) Once it is issued and served, it "must be obeyed." (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 181.) The act required to be performed in this case is the act of permitting Anderson to file additional declarations *and opposition papers that refer to the new declarations*. To the extent that the peremptory writ "expanded" upon or "extended" the prior order, the writ is controlling.

By pointing out that the peremptory writ was drafted by counsel, defendants suggest (and, apparently, the trial court believed) that the additional language does not reflect the intent of this court. However, the fact that the language of an order or writ was drafted by counsel for one party is irrelevant and has no bearing upon its effect or construction. (See *Summers v. City of Cathedral City* (1990) 225 Cal.App.3d 1047, 1069 [Fourth Dist., Div. Two].) Regardless of whether the language of the writ was proposed by counsel or crafted by the court's own hand, its legal effect is the same.

Finally, if defendants believed that the writ as issued was erroneous, they could have moved to recall the remittitur and the writ to correct the writ. (See *In re Rothrock*

(1939) 14 Cal.2d 34, 38-39; *Jensen v. McCullough* (1929) 99 Cal.App. 217, 217-218.) Such a motion can be made by a party or upon the court's own motion upon a showing of "good cause." (Cal. Rules of Court, rules 8.272(c)(2), 8.490(c).) Such cause exists when the court's judgment or writ was procured by fraud, an imposition practiced upon the court or upon the opposing party, a mistake of fact, or inadvertence. (*In re Martin* (1962) 58 Cal.2d 133, 139; see generally 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §§ 847-850, pp. 909-914.) Unless and until such a recall and correction is ordered, the writ must be obeyed according to its terms.

The peremptory writ in this case commanded the court to permit Anderson to file additional declarations and to reference the new declarations in his opposing papers. The failure to do so is error.

B. *Harmless Error*

1. Claims Against Chaffey

We next consider whether the error requires reversal. Under our state Constitution, a reviewing court may not reverse a judgment "for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI § 13.) The applicability of this provision to errors in the summary judgment context was addressed in *Hawkins v. Wilton* (2006) 144 Cal.App.4th 936 (*Hawkins*). In *Hawkins*, the defendant and moving party failed to set forth sufficient facts in its moving papers to negate every theory of liability alleged in the

plaintiff's complaint. (*Id.* at p. 943.) The plaintiff, however, in addition to pointing out that defendant's proffered facts were insufficient to support summary judgment, tendered additional facts in his opposition papers. (*Id.* at p. 942.) The trial court apparently relied upon facts not set forth in the defendants' separate statement. (*Id.* at p. 945.) (Although it is not clear from the opinion, the additional facts were apparently those tendered by the plaintiff in opposition.) In doing so, the trial court "disregarded the statutory framework of summary judgment and improperly shifted the burden to [the plaintiff.]" (*Id.* at p. 943.)

The *Hawkins* court turned to the question of whether the error was prejudicial under the constitutional standard for harmless error. (*Hawkins, supra,* 144 Cal.App.4th at pp. 947-949.) It began by stating: "It has been said that the erroneous granting of a summary judgment motion 'lies outside the curative provisions' of the harmless error provision of the California Constitution because such an error denies a party of its right to a jury trial." (*Id.* at p. 947, quoting *Callahan v. Chatsworth Park, Inc.* (1962) 204 Cal.App.2d 597, 610.) Nevertheless, *Hawkins* continued, "purely technical errors in granting summary judgment can be found harmless." (*Hawkins, supra,* at p. 647.) As an example of such a harmless, technical error, the *Hawkins* court cites to *Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1146, which held that the failure of the trial court to comply with the requirement that it state its reasons for granting summary judgment was harmless. (*Hawkins, supra,* at pp. 947-948.)

The court then considered whether to review the plaintiff's evidence and the defendant's reply "in an effort to salvage the judgment" (*Hawkins, supra,* 144 Cal.App.4th at p. 948); that is, whether it should examine the entire record to determine whether there was a triable issue of material fact and that the moving party was entitled to judgment as a matter of law. The *Hawkins* court concluded that such a task "would be inappropriate." (*Ibid.*) The court explained: "First, it would encourage sloppy motion practices. Second, it casts an unfair burden on this court. Third, most importantly, in these circumstances [the plaintiff] was unfairly placed on the defensive and we simply cannot say that he was able to muster his best case in reply." (*Ibid.*)

Although the nature of the error in *Hawkins* is different from the nature of the error here, the opinion is instructive. While the concern for encouraging "sloppy motion practices" does not apply here, the second and third reasons given by the *Hawkins* court are pertinent. To properly evaluate the motion for summary judgment in this case, we would need to determine, without the benefit of the complete opposition separate statement he was entitled to submit, how Anderson intended to use the additional facts set forth in the new declarations. Did he intend to use them to dispute facts proffered by defendants?; and, if so, which facts? Or was the new evidence being offered to support additional disputed facts not raised by defendants in their moving papers?; and, if so, what new facts? We would need to, in effect, create our own opposition separate statement that incorporates, as best we can, the new evidence into the existing separate statement; if evidence does not fit anywhere in the existing separate statement, we would

need to consider whether the evidence supports a material fact, disputed or undisputed, that was not identified by defendants in their opening separate statement. This is not only burdensome for this court, but would require us to speculate as to how to apply Anderson's evidence—a decision that should be made only by Anderson and his counsel.

The third reason given by *Hawkins,* that the plaintiff was unfairly placed on the defensive and possibly unable "to muster his best case in reply," is also applicable here. By preventing Anderson from filing a meaningful memorandum of points and authorities and a complete separate statement, Anderson was required to oppose the motion for summary judgment without the full benefit of critical adversarial tools that both the summary judgment statute and our peremptory writ authorized. The importance of the separate statement to the summary judgment process was recently stated in *Whitehead v. Habig* (2008) 163 Cal.App.4th 896: "The separate statement is not merely a technical requirement, it is an indispensible part of the summary judgment or adjudication process. 'Separate statements are required not to satisfy a sadistic urge to torment lawyers, but rather to afford due process to opposing parties and to permit trial courts to expeditiously review complex motions for . . . summary judgment to determine quickly and efficiently whether material facts are disputed.' [Citation.]" (*Id.* at p. 902.) As another court stated: "Without a separate statement of undisputed facts with references to supporting evidence in the form of affidavits or declarations, it is impossible for the plaintiff to demonstrate the existence of disputed facts. [Citation.] When a fact upon which plaintiff relies is not mentioned in the separate statement, it is irrelevant that such fact might be buried in the

mound of paperwork filed with the trial court; the court does not have the burden to conduct a search for facts that counsel failed to bring out." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116.) By refusing to permit Anderson to file a separate statement that incorporates the evidence in the new declarations, the court, in essence, required him to litigate a case-dispositive motion with one hand tied behind his back. The procedure was unfair to Anderson and deprived him of a full and fair hearing.

The *Hawkins* court also noted that "[o]ther courts have held that simply *shortening time* on summary judgment motions is reversible error." (*Hawkins, supra,* 144 Cal.App.4th at p. 948, citing *Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645 and *Urshan v. Musicians' Credit Union* (2004) 120 Cal.App.4th 758 (*Urshan*); see also *McMahon v. Superior Court* (2003) 106 Cal.App.4th 112, 118.) In *Urshan*, the trial court ordered an abbreviated briefing schedule for a motion for summary judgment. (*Urshan, supra,* at p. 763.) Under the schedule, the plaintiff had to file his opposition papers two days after the moving papers were filed. (*Ibid.*) The plaintiff did not object to the schedule or request a continuance; he submitted his opposition papers within the court's prescribed time period and it does not appear from the opinion that there was any evidence that he was unable to submit due to the time constraints. (*Id.* at pp. 763, 767-768.) The court granted the motion. (*Id.* at p. 763.) The Court of Appeal reversed, stating that allowing "only two days to prepare a summary judgment motion or an opposition is a woefully inadequate period of time to prepare and present what may well turn out to be the most important series of documents in the entire case. The Legislature

recognized this reality of litigation and by its use of mandatory language deprived a trial court of the authority to shorten the notice period for hearing summary judgment motions." (*Id.* at p. 766, fn. omitted.) The procedure, the court held, "was tantamount to a denial of due process." (*Id.* at p. 765, fn. omitted.) In light of its conclusion that "the summary judgment must be reversed for failure to comply with the mandatory minimum notice period for hearing summary judgment motions," the court declined to consider the defendant's "other arguments regarding the merits of the judgment." (*Id.* at p. 768, fn. 19.)

Here, our peremptory writ was no less mandatory than the statutorily prescribed time period at issue in *Urshan*. And, as in that case, the papers that Anderson was precluded from filing "may well turn out to be the most important series of documents in the entire case." Indeed, the complete prohibition against filing the opposition papers that we ordered must be permitted is potentially more prejudicial than was the shortened time period for filing opposition papers in *Urshan*.

For all these reasons, we cannot conclude that the error in this case was harmless as to Chaffey. Following remand, if Chaffey renews its motion for summary judgment, the court must permit Anderson to file opposition papers (including a memorandum of points and authorities and a separate statement) to reference the additional declarations filed in opposition to the motion.

2. Retaliation Claim Against Individual Defendants

Defendants point out that following the grant of summary judgment in this case, our state Supreme Court decided *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158. In that case, the court held that although an employer may be liable for retaliation under the FEHA, "nonemployer individuals are not personally liable for their role in that retaliation." (*Id.* at p. 1173.) Anderson does not respond to this point in his reply brief. Because the only remaining cause of action asserted against the individual defendants in this case is for retaliation under the FEHA, judgment in their favor is proper as a matter of law regardless of any procedural error or the merits of the claims as to Chaffey. Accordingly, we will affirm the judgment in favor of the individual defendants. (See *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 754 ["we affirm the summary judgment if it is correct on any legal ground applicable to this case, whether that ground was the legal theory adopted by the trial court or not, and whether it was raised by defendant in the trial court, or first addressed on appeal."].)

III. DISPOSITION

The judgment in favor of Chaffey is reversed. The court is directed to vacate its order granting defendants' motion for summary judgment as to Chaffey and to conduct further proceedings consistent with the views expressed in this opinion. The judgment in favor of the individual defendants is affirmed. The parties shall bear their respective costs on appeal.

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/s/ King
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Richli
J.